MOTION FILED
JUN 9 1980

No. 79-1802

In the Supreme Court of the United States

October Term, 1979

HEWITT P. TOMLIN, JR.; HOMER H. WALDROP; ROY HALL; and DAVID R. FARMER, Individually and As Partners Doing Business Under the Name and Style of Waldrop, Hall, Tomlin and Farmer, a Professional Business Association,
Petitioners,

vs.

JOAN WOODRUFF; PATRICIA WOODRUFF HAMILTON; and LOUIS HAMILTON,
Respondents.

MOTION OF TENNESSEE BAR ASSOCIATION UNDER RULE 42(3.) FOR LEAVE TO FILE THIS BRIEF AS AMICUS CURIAE

WILSON SIMS
2700 First American Center
Nashville, Tennessee 37238

and

JAC CHAMBLISS
1111 Maclellan Building
Chattanooga, Tennessee 37402

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

MOTION OF TENNESSEE BAR ASSOCIATION

Comes the Tennessee Bar Association and respectfully moves the Court that it be allowed to file its Brief in support of the Petition of Hewitt P. Tomlin, Jr., et al. for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit. This Motion incorporates the Brief of the Tennessee Bar Association, as amicus curiae.

It is not the purpose of the Tennessee Bar Association to take a position in support of any litigant; rather it is the purpose of the Association to express great concern on behalf of the trial attorneys in the State of Tennessee that the opinion of the Sixth Circuit in this cause has recreated the situation sought to be remedied by *Erie Railroad Co. v. Tompkins,* 304 U.S. 64 (1938) - or two divergent or conflicting systems of law, one to be applied by the Tennessee State Courts and the other to be applied in the Federal Courts concerning the standards governing negligence or malpractice suits against attorneys engaged in Tennessee litigation.

Tennessee Bar Association was permitted to file an amicus curiae brief before the Court below arguing that, under Tennessee law, there can be no cause of action for malpractice against an attorney arising out of the manner in which he honestly and in good faith chooses to litigate his client's case. This Association urged that the Tennessee law in this regard was settled by *Stricklan v. Koella,* 546 S.W.2d 810 (Tenn. Ct. App. 1976), *cert. denied* (Tenn. 1977). The Association argued that under *Erie,* and specifically under *West v. American Telephone & Telegraph Co.,* 311 U.S. 223 (1940) (since *Stricklan* is an opinion of an intermediate appellate court in Tennessee and not the Tennessee Supreme Court) Federal Courts judging the performance of a Tennessee attorney engaged in Tennessee litigation are bound by the Tennessee law. In addition, the Association argued that the record in this case would not sustain a jury verdict against a Tennessee lawyer because such verdict would necessarily be based upon speculation and guess-

work as to the proximate cause and measure of the plaintiff's injury and damages.

This movant states that its position as to the standard of performance by which a Tennessee lawyer in litigation is judged is fully and adequately set forth and argued in the Tomlin Petition for Writ of Certiorari. However, the Association moves the Court that it be permitted to demonstrate that the opinion of the Sixth Circuit Court misinterprets and fails to apply the Tennessee law of proximate cause and the proper measure of damages in legal malpractice actions in Tennessee. Movant's argument is as follows.

To recover in Tennessee, the client, in an attorney malpractice action, must prove that he would have been successful in the prosecution or defense of the action in question *but for* the attorney's negligence of which he complains. *Gay & Taylor, Inc. v. American Cas. Co. of Reading, Pa.*, 93 Tenn. App. 120, 381 S.W.2d 304 (1964).

In Tennessee, a "jury is [not] permitted to speculate or guess as to proximate cause of injury". *Moon v. Johnston*, 47 Tenn. App. 208, 337 S.W.2d 464, 469 (1959). If from all the evidence it is a matter of conjecture, or surmise as to the cause of the injury, a verdict should be directed for the defendant. *Tenn. Cent. Ry. Co. v. Williams*, 9 Tenn. App. 529 (1929).

Tennessee, in *Stricklan*, reaffirms that its general law of proximate cause is applicable in attorney malpractice cases such as the instant case:

> "In a suit [against a trial attorney] complaining of the manner in which proof was presented and the manner of examination and cross-examination of witnesses, *only by pure guesswork can the verdict of a jury be examined and a so-called cause for that verdict be determined.* No man shall suffer a judgment against him based on guess." 546 S.W.2d at 813. [Emphasis added]

The trial judge in this case, Judge Bailey Brown (now Circuit Judge), held that he, as a federal judge, must apply the law of Tennessee and was, therefore, bound by *Stricklan* (and universally accepted principles of negligence and proximate cause law, as well), and stated:

> "The second reason why this court had serious doubt as to whether this action could be maintained has to do with causation; the malpractice jury is called upon to determine whether, if something that was done by the defendant trial lawyer had not been done or something that was not done had been done, the jury verdict in the personal injury case would have been different. This means that, in the malpractice trial, the personal injury trial becomes a play within a play; that is to say, the personal injury trial is replayed, by reading the record thereof, before the malpractice jury and witnesses then testify about the things that were done or not done by the malpractice defendant. It is interesting to note that, in principle at least, if an action such as this can be maintained, then an action could be maintained by the plaintiffs in this malpractice case against the attorneys representing them here, in which case there would be a play within a play. *In any event, it seemed to this court that it would be speculation for the malpractice jury to say what the personal injury jury would have done but for (we will assume) negligence on the part of the trial lawyer.*" 423 F. Supp. at 1288. [Emphasis added]

Under *Erie*, the federal court in diversity cases, on matters of negligence and proximate cause, is bound by the law of the forum state. *Peerless Ins. Co. v. Cerny & Associates, Inc.*, 199 F. Supp. 951 (D. Minn. 1961). Indeed, in all aspects of the law of negligence the law of the forum state is controlling. *Cordle v. Renault, Inc.*, 361 F.2d 332 (6th Cir. 1966).

Stricklan is not the only appellate decision establishing the Tennessee law of proximate cause in regard to

attorney malpractice suits. The Sixth Circuit and this Court cannot ignore these Tennessee decisions and be "convinced by other persuasive data that the highest court of the state would decide otherwise". *West v. American Telephone and Telegraph Co.*, 311 U.S. 223, 237. The Sixth Circuit opinion itself correctly declares "the Tennessee Rule", of proximate cause and quotes with apparent approval, from *Gay & Taylor, Inc. v. American Casualty Co., supra,* as follows:

> "The burden of proving that damages resulted from the negligence of an attorney, or from his failure to follow instructions, in connection with the prosecution or defense of a suit rests upon the client and usually requires the client to demonstrate that, *but for the negligence complained of, the client would have been successful in the prosecution or defense of the action in question.* 7 Am. Jur., Attorneys at Law, Sec. 188, p. 156; Anno. 45 A.L.R.2d 21." [Emphasis added]

But then the Sixth Circuit Court puts misplaced reliance upon *Loftis v. Finch,* 491 S.W.2d 370, 373 (Tenn. App. 1972), *cert. denied* (1973) and *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931) and states that a jury question for proximate cause is presented on the conflict of interest claim[1] of the plaintiffs. The *Loftis* case was not an attorney malpractice case but was an automobile collision case involving personal injuries, medical expense, lost personal property and lost earnings. *Story Parchment Co.* involves damages under the Sherman Antitrust Act and is not concerned with state law.

We must agree with dissenting Judge Merritt of the Sixth Circuit that the majority opinion of the Court below

---

1. While the Sixth Circuit holds that the jury question is also presented by Tomlin's failure to interview and present available witnesses and failure to bring to the attention of the Trial Court certain Tennessee traffic statutes, the Court's discussion of those two issues does not address this critical issue of proximate cause. On both the witness question and traffic statute question no second jury could determine the effect on the verdict of the first jury of the absent witnesses or traffic statute arguments.

"gives no consideration at all to . . . proximate causation and fails entirely to analyze this issue." 616 F.2d at 946.

To paraphrase the Tennessee Court in *Stricklan* there is no way any subsequent jury "can tell with one iota of certainty how another . . . jury would have decided a case if such and such had been said or done or had not been said or done . . ." The Sixth Circuit opinion concedes that any jury verdict in this case involves guesswork, albeit "second guessing." 616 F.2d 937. As stated by District Judge (now Circuit Judge) Brown "in any event it seems to this court that it would be speculation for the malpractice jury to say what the personal injury jury would have done but for (we will assume) negligence on the part of the trial lawyer." 423 F. Supp. at 1288.

Thus, the opinion of the Sixth Circuit is erroneous and contrary to the law of Tennessee and disturbs Movant because of the apparent inattention to the creation of different standards of attorney malpractice litigation in violation of *Erie* and the failure of the Court to deal with the proximate cause issue discussed herein.

CONCLUSION

For the reasons set out above the Tennessee Bar Association joins in the Petition for Writ of Certiorari by Tomlin and requests that this motion be allowed as its Brief Amicus Curiae, in support of the Writ. The issues raised in this lawsuit are of most critical importance to the trial bar of Tennessee, and of other states.

Respectfully submitted,

WILSON SIMS
2700 First American Center
Nashville, Tennessee 37238

and

JAC CHAMBLISS
1111 Maclellan Building
Chattanooga, Tennessee 37402

CERTIFICATE OF SERVICE

The undersigned hereby certifies that three copies of the foregoing Motion of Tennessee Bar Association have been served upon the following counsel of record on this the 6th day of June, 1980:

Mr. Norman Herring
Attorney at Law
114 West Adams Street
Phoenix, Arizona 85003

Mr. James F. Schaeffer
Attorney at Law
100 North Main Building
Suite 3100
Memphis, Tennessee 38103

Mr. Thomas Prewitt, Sr.
Attorney at Law
One Commerce Square
Memphis, Tennessee 38103

Mr. Leo Bearman, Jr.
Attorney at Law
1140 Sterick Building
Memphis, Tennessee 38103

Mr. John J. Thomason
Attorney at Law
100 North Main Building
Suite 2518
Memphis, Tennessee 38103

WILSON SIMS